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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/989,845	11/21/2001	James E. Lerch JR.	011215	1251

23774 7590 05/27/2003

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EXAMINER

GARCIA, ERNESTO

ART UNIT

PAPER NUMBER

3679

DATE MAILED: 05/27/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

8K

<b>Office Action Summary</b>	<b>Application No.</b> 09/989,845	<b>Applicant(s)</b> LERCH, JAMES E.	
	<b>Examiner</b> Ernesto Garcia	<b>Art Unit</b> 3679	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 21 November 2001 and 21 April 2003.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-24 is/are pending in the application.
- 4a) Of the above claim(s) 6,13,17 and 23 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5,7-12,14-16,18-22 and 24 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 21 November 2001 is/are: a) ☐ accepted or b) ☒ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____  |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s) <u>4</u> | 6) <input type="checkbox"/> Other: _____                                    |

### **DETAILED ACTION**

Claims 16-25 were renumbered to 15-24 since claim 15 is missing. The renumbered claims 19-24 depend to the renumbered claims that correspond accordingly.

### ***Election/Restrictions***

Claims 6, 13, 17 and 23 are withdrawn from further consideration pursuant to 37 CFR 1.142(b), as being drawn to a nonelected species, there being no allowable generic or linking claim. Applicant timely traversed the restriction (election) requirement in Paper No. 6.

Applicant's election with traverse of species II in Paper No. 6 is acknowledged. The traversal is on the grounds that claims 1, 8 and 18 are generic and as such may be examined for Group I or Group II and not impose an undue burden. This is not found persuasive because the restriction is not between the generic claims but rather those claims directed to the second species which are a burden to find and examine; furthermore, applicant has not traversed on the ground that the species are not patentably distinct and the applicant has not submitted evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on

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the record that this is the case. In either instance, the requirement is still deemed proper and is therefore made FINAL.

### ***Drawings***

The drawings are objected to under 37 CFR 1.83(a). The drawings must show every feature of the invention specified in the claims. Therefore, the T-shaped channel and the one leg of the U-shaped channel extending inwardly within the U-shaped channel (claims 1, 8 and 18) must be shown or the feature(s) canceled from the claim(s). No new matter should be entered.

The drawings are objected to under 37 CFR 1.83(a) because they fail to show in what direction is inwardly as described in the specification, page 7, line 15. Any structural detail that is essential for a proper understanding of the disclosed invention should be shown in the drawing. MPEP § 608.02(d).

A proposed drawing correction or corrected drawings are required in reply to the Office action to avoid abandonment of the application. The objection to the drawings will not be held in abeyance.

### ***Specification***

Applicant is reminded of the proper language and format for an abstract of the disclosure.

The language should avoid using phrases, which can be implied, such as, "The disclosure concerns," "The disclosure defined by this invention," "The disclosure describes," and "This invention relates", etc.

The disclosure is objected to because of the following informalities:

the shape of the channel is unclear. Page 7 in line 7-8 describes Fig. 1 as having a T-shaped channel; however, line 15-16 of page 7 contradicts the shape of the channel as being U-shaped. Appropriate correction is required.

### ***Claim Objections***

Claims 1, 4, 7, 8, 14-18 and 24 are objected to because of the following informalities:

regarding claim 1, the limitation "channels" in line 7 should be --channel--, and the limitation "a perforation" in line 14 should be --the perforation--;

regarding claim 7, the limitation "post" should be --posts--;

regarding claim 8, the limitation "channels" in line 7 should be --channel--;

regarding claims 14-17, the limitation "post" in line 1 should be --posts--;

regarding claim 18, the limitation "channels" in line 7 should be --channel--,

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--the-- should be inserted before the first occurrence of "at" in line 4 and before "vertically" in line 9, the limitation "a perforation" in line 15 should be --the perforation--; and,

regarding claim 24, the limitation "post" in line 2 should be --posts--. Appropriate correction is required.

***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-5, 7-8-12, 14-16, 18-22 and 24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Regarding claims 1, 8 and 18, it is unclear how a T-shaped channel differs from a U-shaped channel given that no difference is described or shown. For purposes of examination the channel has been considered U-shaped as the three legs or walls (unreferenced, Fig. 2) make the U-shaped channel and the U-shaped channel has the inwardly extending tabs 7.

Regarding claims 2, 9 and 19, each claim appears as a triple inclusion of the one leg 7 of the U-shaped channel that extends inwardly within the U-channel as the one leg

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7 in claim 1 in line 7 has been considered, synonymously, as one inwardly extending tab 7 (leg). Claims 2, 9 and 19 further include two more legs extending inwardly thereby being three legs extending inwardly overall.

Regarding claims 3-5 and 7, the claims depend from claim 1 and therefore are indefinite.

Regarding claims 10-12 and 14-16, the claims depend from claim 8 and therefore are indefinite.

Regarding claim 20-22 and 24, the claims depend from claim 18 and therefore are indefinite.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-3, 8-10 and 18-20 are rejected under 35 U.S.C. 102(b) as being anticipated by Case, 3,388,892 (see attachment).

Regarding claim 1, Case discloses an improvement comprising at least one longitudinally extending railing **82**, vertically extending posts **56**, and fastening means **42c**.

The railing **82** has at least one generally U-shaped channel **86**. The channel **86** extends in a longitudinal direction **A3** of the railing **82** and at least one leg **A12** of the channel **86** extends inwardly within the channel **86**.

The posts **56** each having an elongated body **A5** and at least two flange segments **58**. The flange segments **58** extend outwardly in opposite directions **A7** and have at least one perforation **71** in each of the flange segments **58**.

The fastening means **42c** are slidably embraced within the channel **86** and the fastening means **42c** extend through the perforation **71** in the flange segments **58** and fastened to the posts **56**.

Regarding claim 8, given the improvement as recited in claim 1 above or the apparatus as recited in claim 18 below, the method is inherently performed when the improvement or the apparatus is assembled.

Regarding claims 2, 9 and 19, as best understood, the leg **A12** of the channel **86** comprises an inwardly extending tab **A12** at an end of a leg **A13** of the channel **86**.



Regarding claim 18, Case discloses in Figures 1-3 an apparatus comprising a barrier **32**. The barrier **32** has at least one longitudinally extending railing **82**, vertically extending posts **56**, and fastening means **42c**.

The railing **82** has at least one generally U-shaped channel **86**. The channel **86** extends in a longitudinal direction **A3** of the railing **82** and at least one leg **A12** of the channel **86** extends inwardly within the channel **86**.

The posts **56** each having an elongated body **A5** and at least two flange segments **58**. The flange segments **58** extend outwardly in opposite directions **A7** and have at least one perforation **71** in each of the flange segments **58**.

The fastening means **42c** are slidably embraced within the channel **86** and the fastening means **42c** extend through the perforation **71** in the flange segments **58** and fastened to the posts **56**.

Regarding claims 3, 10 and 20, the railing **82** has another u-shaped channel **90** thereby the railing **82** has at least two U-shaped channels **86,90**.

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-2, 4, 5, 7-9, 11, 14-18, 19, 21, 22 and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over McMullin, 3,258,250 (see marked-up attachments), in view of Case, 3,388,892.

Regarding claim 1, McMullin discloses an improvement comprising at least one longitudinally extending railing **37**, vertically extending posts **11**, and fastening means **34**.

The railing **37** has at least one generally U-shaped channel **A2**. The channel **A2** extends in a longitudinal direction **A3** of the railing **37** and at least one leg **45** of the channel **A2** extends inwardly within the channel **A2**.

The posts **11** each having an elongated body **14** and at least two flange segments **A6**. The flange segments **A6** extend outwardly in opposite directions **A7** and have at least one perforation **32** in at least one of the flange segments **A6** (Fig. 1; attachment).

The fastening means **34** are slidably embraced within the channel **A2** and the fastening means **34** extend through the perforation **32** in the flange segments **A6** and fastened to the posts **11**. However, McMullin does not show another perforation in the other one of the flange segments **A6** thereby making each of the flange segments **A6** having at least one perforation to connect the rail. Case teaches in Figure 7 at least one perforation **71** in each flange segment **58** to connect a rail to a post. Therefore, as taught by Case, it would have been obvious to one of ordinary skill in the art at the time

the invention was made to include at least one perforation **32** in each of the flange segments **A6** to connect the rail to the posts.

Regarding claims 2, 9 and 19, as best understood, the leg **45** of the channel **A2** comprises an inwardly extending tab **45** at an end of a leg **41** of the channel **A2**.

Regarding claims 4, 11 and 21, the railing **37** has a T-shaped slot **A11**.

Regarding claims 5, 12 and 22, the flange segments **A6** extend at 180 degrees angle to each other.

Regarding claim 8, given the improvement as recited in claim 1 above or the apparatus as recited in claim 18 below, the method is inherently performed when the improvement or the apparatus is assembled.

Regarding claim 18, McMullin discloses in Figures 1 and 3 an apparatus comprising a barrier **36**. The barrier **36** has at least one longitudinally extending railing **37**, vertically extending posts **11**, and fastening means **34**.

The railing **37** has at least one generally U-shaped channel **A2**. The channel **A2** extends in a longitudinal direction **A3** of the railing **37** and at least one leg **45** of the channel **A2** extends inwardly within the channel **A2**.

The posts 11 each having an elongated body 14 and at least two flange segments A6. The flange segments A6 extend outwardly in opposite directions A7 and have at least one perforation 32 in each of the flange segments A6.

The fastening means 34 are slidably embraced within the channel A2 and the fastening means 34 extend through the perforation 32 in the flange segments A6 and fastened to the posts 11.

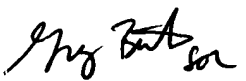
Regarding claims 7 and 24, McMullin, as discussed above, discloses the railing 37 and the posts 11 are formed from metal (col. 1, lines 11-17). However, McMullin fails to disclose the metal being aluminum by an extrusion process. Applicant is reminded that, within the general skill of a worker in the art, selecting a known material on the basis of its suitability for the intended use is a matter of obvious design choice. Therefore, it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the railing and the vertical post from aluminum. *In re Leshin*, 125 USPQ 416. Furthermore, applicant is reminded that the method of forming the railing and the posts by an extrusion process is not germane to the issue of patentability of the device itself. Therefore, this limitation has been given limited patentable weight. See MPEP ' 2113.

Regarding claims, 14-17, it is well know in the art to make a railing or posts by an extrusion process.

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ernesto Garcia whose telephone number is 703-308-8606. The examiner can normally be reached from 8:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Lynne H Browne can be reached on 703-308-1159. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9326 for regular communications and 703-872-9327 for After Final communications. Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-2168.

  
**Lynne H. Browne**  
**Supervisory Patent Examiner**  
**Technology Center 3600**

E.G.

May 20, 2003

Attachments: one marked-up copy of Case, 3,388,892; and,  
one blown-up marked-up copy of the British patent, GB-1,369,301.